WONG THAM MENG

v.

TIANG ENG & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUMMONS NO: MT4-22-1183-98]
29 JUN 2001

CIVIL PROCEDURE: *Summary judgment - Application under O. 14 of the Rules of the High Court 1980 - Effect of National Company For Foreign Trade v. Kayu Raya Sdn Bhd - Whether defendants have raised triable issues - Whether defendants have committed fundamental breach of agreement - Whether plaintiff entitled to judgment*

CIVIL PROCEDURE: *Preliminary objection - On point of procedure - Whether plaintiff had applied wrong procedure under O. 14 RHC 1980 - Applicability of O. 81 RHC 1980 - Whether preliminary objection should be allowed*

The plaintiff and defendants entered into a sale and purchase agreement (the "agreement") for the purchase of some property. In the course of events, the defendants failed to settle the balance purchase price by either the completion date of the property or the extension date as was stipulated in the agreement. In the face of such failure, the property was nevertheless transferred to the defendants' names. Hence, this present application by the plaintiff in encl. 11 for summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC") claiming for declarations, vacant possessions, arrears of rental and costs against the defendants.

Before proceeding to deal with the plaintiff's application on its merits, the defendants raised a preliminary objection on the ground that since the plaintiff is asking for declarations in encl. 11 which is an application under O. 14 of the RHC, the plaintiff had applied the wrong procedure. They contended that the correct procedure is that under O. 81 of the RHC, as the subject matter involved landed property.

Held:

[1] The provisions of O. 81 are clear and unambiguous in that a procedure is enacted to enable a plaintiff to obtain summary judgment, similar to O. 14, in the event there is no defence to the action, in respect of a prayer for, *inter alia*, specific performance of an agreement, for the sale

and purchase of land. Where a plaintiff seeks to obtain a relief for specific performance or any other relief specifically stated there, then he must invoke O. 81.

[1b] Order 81 has been specifically enacted to enable a plaintiff to apply for specific performance. Since there is no such relief claimed or prayed for by the plaintiff in encl. 11, O. 81 does not apply.

[1c] The plaintiff's claims are prayers for relief which are not excluded or barred by the exceptions specifically provided for under O. 14. Under the circumstances, the submissions raised by the defendants in the preliminary objection herein are baseless and are hereby dismissed.

[2] From a perusal of the documents, the preliminary requirements for proceeding under O. 14 as set out in *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* have been complied. The plaintiff has therefore established a *prima facie* case and he becomes entitled to judgment.

[3] The defendants were not able to particularise any single triable issue and satisfy the court why judgment should not be given against them. It is obvious that the defendants have committed a fundamental breach in defaulting to pay the balance of the purchase price and thus, the plaintiff is entitled to summary judgment under O. 14.

[Order in terms.]

Case(s) referred to:
Chong Ket Sui David v. Datuk Chau Tet On [1993] 3 CLJ 468 ***(foll)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220 ***(foll)***
Soon Kong Meng & Anor v. Lee Thye & Ors [1995] 4 CLJ 547 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 2, O. 81, O. 92 r. 4

For the plaintiff - LL Yap; M/s KB Chua & Co
For the defendants - Balvinder Singh; M/s BC The & Yeoh

Reported by Raja Vishnu Sivarajah

a

JUDGMENT

Low Hop Bing J:

Application

b This is the plaintiff's application in encl. (11) for summary judgment under O. 14 of the Rules of the High Court 1980 in the following terms:

1. A declaration that the sale and purchase agreement between the plaintiff and both the defendants dated 16 September 1994 has been terminated on 21 December 1996;

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2. A declaration that the registration and transfer of the land held under HS(M) 4682, P.T. No. 11024, in the Mukim of Ampang, in the district of Ulu Langat, Negeri Selangor together with a two-storey house erected thereon known as No. 4, Jalan 24, Taman Putra Selangor, 68000 Ampang, ("the property") is a wrongful transfer and void;

d

3. A declaration that the plaintiff is at all material times the lawful registered and beneficial owner of the property;

4. An order that both the defendants transfer the property to the plaintiff by signing, executing and completing the memorandum of transfer, other documents and instruments for the purpose of transferring and registering the property in the name of the plaintiff;

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5. An order that both the defendants obtain from the State Authority the consent to transfer the property to the plaintiff's name by signing, executing and completing all documents for the purpose of obtaining the said consent;

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6. An order that both the defendants surrender all documents including the original issue document of title, memorandum of transfer in connection with the transfer of the property by both the defendants to the plaintiff and take all necessary steps to comply with this order;

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7. An order that the Registrar of Titles, Selangor and/or all other land office or authority make an entry and memorial on the register of titles and other records, and take all necessary steps to comply with this order;

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8. An order that both the defendants give up vacant possession of the property to the plaintiff within 30 days from the date of this order;

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9. An order that both the defendants pay to the plaintiff arrears of rental at RM400 per month from January 1997 to the date of vacant possession, with interest at 8% per annum from the date of filing the writ hereof to the date of realisation; and

10. Costs

Facts Of The Case

The facts of the case are gathered from documentary exhibits annexed to the affidavits filed herein and are simple and straightforward, as they have not been disputed by both the defendants. On 16 September 1994, the plaintiff and both the defendants entered into the sale and purchase agreement for the property for a purchase price of RM56,000. The date of completion is four months from the date both the defendants or their solicitors receive the plaintiff's notice that the plaintiff has obtained the consent from the State Authority to transfer the property to both the defendants. The defendants did on 9 July 1996 receive the plaintiff's notice that the plaintiff has obtained the said consent. That being the case, the date of completion is four months therefrom i.e. on or before 9 November 1996: cl. 2.1 of the sale and purchase agreement.

Pursuant to cl. 2.2 of the sale and purchase agreement, an extension of one month may be given by the plaintiff as vendor, provided that both the defendants as purchasers pay the plaintiff interest at 8% per annum on the balance of the purchase price or any part thereof on a daily basis from the day after the completion date to the date of full payment. The plaintiff gave both the defendants an extension of one month and the extension date is 9 December 1996 pursuant to cl. 2.2 of the sale and purchase agreement.

Under cl. 3 of the sale and purchase agreement, if both the defendants fail to pay the balance of the purchase price on or before the extension date, the plaintiff is entitled to forfeit the 10% deposit i.e. RM5,600 as agreed liquidated damages and the sale and purchase agreement shall be terminated and be deemed null and void.

On the basis of cl. 10 of the sale and purchase agreement, the plaintiff upon receiving the 10% deposit of RM5,600 agreed to give both the defendants vacant possession of the property by way of renting until the payment of the balance of the purchase price by the completion date or the extension date, as the case may be.

Pursuant to the correspondence between both the defendants' solicitors and Malaysia Building Society Bhd i.e. the chargee of the property, an exemption of 11 days had been given to both the defendants i.e. from 2 December 1996 to 12 December 1996, as a result of which the new extension date is 20 December 1996.

Notwithstanding the receipt by both the defendants from the plaintiff of the plaintiff's notice dated 9 July 1996 that the consent from the State Authority has been obtained to transfer the property to both the defendants, both the defendants have failed to pay the plaintiff the balance of the purchase price by either the completion date on 9 November 1996, or the extension date on 9 December 1996 which, inclusive of the 11-day exemption as alluded to above, is agreed as 20 December 1996. In the face of such failure on the part of both the defendants, the transfer documents for the property were nevertheless presented for registration on 30 December 1996.

The plaintiff *vide* letter dated 3 January 1997 notified both the defendants that the sale and purchase agreement has already become null and void as a result of both the defendants' default in the payment of the balance of the purchase price on or before 20 December 1996.

Defendant's Preliminary Objection And Submission

Before proceeding to deal with the plaintiff's application on its merits, Balvinder Singh, learned counsel for both the defendants, raised a preliminary objection on the ground that since the plaintiff is asking for declarations in encl. (11) which is an application for summary judgment under O. 14, the plaintiff has applied the wrong procedure and is therefore baseless. He submitted that the correct procedure is that under O. 81, as the subject matter involves landed property. He relied on *Atkin's Court Forms* (2nd edn) 37, 1990 issue p. 58 and also the Federal Court decision in *Soon Kong Meng & Anor v. Lee Thye & Ors* [1995] 4 CLJ 547. However, although he conceded that this Federal Court decision has no connection at all with the instant case, he said that the important point is that where landed property is concerned, O. 81 would apply.

The second part of his submission consists of a couple of short and scanty sentences to the effect that the plaintiff's application is a difficult or complicated one and is not plain and obvious and there are triable issues. Hence the court has the discretion to dismiss it with costs.

Submission For Plaintiff

L.L. Yap, learned counsel for the plaintiff in her reply to the preliminary objection, states that the plaintiff's application in encl. (11) contains prayers for declarations, vacant possession, arrears of rental and costs, which are suitable for invoking the O. 14 procedure and not the O. 81 procedure.

She added that even if the O. 81 procedure were applicable this court is not prevented from giving the relief prayed for by the plaintiff. In any event, she submitted that the court has the inherent jurisdiction under O. 92 r. 4 to give the said relief, as both the defendants have not been prejudiced.

In respect of the plaintiff's substantive application, plaintiff's learned counsel contended that both the defendants have breached cll. 2.1 and 2.2 of the sale and purchase agreement when they failed to complete the payment of the balance of the purchase price on the extension date i.e. 20 December 1996 and yet the property was transferred to both the defendants' names, in which case she added that the transfer is wrongful, since the sale and purchase has been terminated on 21 December 1996 and null and void thereafter. For both the defendants' occupation and continued occupation of the property, the plaintiff is, in her view, entitled to arrears of rental at RM400 per month from January 1997 to the date both the defendants give up vacant possession to the plaintiff.

She argued that both the defendants have no defence nor did they raise any triable issue in this case. Further she said that both the defendants have committed a fundamental breach of the sale and purchase agreement.

Decision Of The Court

Preliminary Objection

The preliminary objection raised by learned counsel for the plaintiff is primarily based on the Federal Court decision in *Soon Kong Meng, supra,* where the application was filed under O. 81, for specific performance. Order 81 is reproduced as follows:

1. (1) In any action begun by writ indorsed with a claim:

    (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or

    (b) for rescission of such an agreement; or

(c) for the forfeiture or return of any deposit made under such an agreement,

the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has entered an appearance in the action.

The provisions of O. 81 are clear and unambiguous in that a procedure is enacted to enable a plaintiff to obtain summary judgment, similar to O. 14, in the event that there is no defence to the action, in respect of a prayer for, *inter alia*, specific performance of an agreement (whether in writing or not) for the sale and purchase of land. In my view, where a plaintiff seeks to obtain a relief for specific performance or any other relief specifically stated there, then he must invoke O. 81.

However, on the other hand, where a plaintiff does not seek the relief of specific performance or any other relief under O. 81, he is not obliged to employ the O. 81 procedure.

In the instant case, I have scrutinised each and every relief contained in the plaintiff's prayers in encl. (11) and it is my finding that there is no relief, either expressly or by necessary implication, for specific performance or any other relief provided under O. 81. The plaintiff's prayers are for declarations, vacant possession, arrears of rental and costs pursuant to the sale and purchase agreement. Order 81 has been specifically enacted to enable a plaintiff to apply for e.g. specific performance and since there is no such relief claimed or prayed for by the plaintiff in encl. (11), I hold that O. 81 does not apply.

Further, *Soon Kong Meng, supra*, as conceded by learned counsel for the defendants, has no connection with the instant case, as the facts were entirely different. In fact Peh Swee Chin (FCJ) (as he then was), made it clear that the Federal Court was giving the grounds for deciding on one of the points raised. The point was that the plaintiff in their supporting affidavit in respect of the application under O. 81 had failed to depose that in their belief there was no defence to the action. In the circumstances, it is difficult to see how the Federal Court decision could be of any assistance to both the defendants in the case before me. Similarly, a *fortiori*, in the light of the non-applicability of O. 81, I am unable to see how the *Atkin's Court Forms* relied upon by the defendants could lend any strength to the contention of the learned counsel for both the defendants.

Order 14, on the other hand, is applicable to a wider category of claims: *Malaysian Court Practice*, 2000 MLJ p. 5302 para 81.1.2. Order 14 reads as follows:

> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
>
> (2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes:
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> (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or
>
> (b) a claim by the plaintiff based on an allegation of fraud
>
> (3) This Order shall not apply to an action to which Order 81 applies.

The wide category of claims covered by O. 14 may only be limited or circumscribed by the exceptions specifically provided therein *viz*. O. 14 procedure does not apply to a claim by the plaintiff:

(a) for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) based on an allegation of fraud.

It also does not apply to an action to which O. 81 applies.

In my view, these are the only exceptions to which the O. 14 procedure cannot be invoked. Apart from the aforesaid exceptions, O. 14 is applicable to e.g. declaratory relief: *Malaysian Court Practice*, 2000 MLJ p. 269, para (6). In *Chong Ket Sui David v. Datuk Chau Tet On* [1993] 3 CLJ 468, it was held that there is no reason why O. 14 may not be employed in an action for declaration where the case is clear and declarations were indeed granted to the plaintiff therein that the defendants had acted *ultra vires* the constitution of the club and in bad faith in expelling the plaintiff.

Further, the plaintiff's claims for vacant possession, arrears of rental and costs in the instant case are prayers for relief which are not excluded or barred by the exceptions specifically provided for under O. 14. In the circumstances, I hold that the contention for both the defendants is baseless and is hereby dismissed. I do not feel the necessity to consider submissions in respect of other areas raised in the preliminary objection herein.

Summary Judgment

The Federal Court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220 set out the preliminary requirements for proceeding under O. 14, as follows:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r. 2 of O. 14.

From a proper perusal of the documents filed herein, I find that both the defendants have entered their appearance on 12 October 1998; that the statement of claim has been served on both the defendants who in addition to the appearance, have also filed their defence on 30 October 1998 and the affidavit in support of the application has also complied with O. 14 r. 2 in that the prayers did not come within the exceptions provided thereunder.

That being the case, following the Federal Court in *National Company For Foreign Trade, supra*, I hold that the plaintiff has therefore established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to both the defendants to satisfy the court why judgment should not be given against them.

After going through the short and scanty written submission of the defendants' learned counsel and also his oral submission, I have not been able to find any point of substance which can be considered as having satisfied the court why judgment should not be given against the defendants.

As I have stated earlier in my judgment the facts are descrnible from the documents annexed to the affidavits filed herein. The written and oral submissions of learned counsel for both the defendants have made less than a feeble attempt to incorporate a merely bare assertion that the plaintiff's application is a difficult or complicated case and that there are triable issues. The submissions did not refer to any particular aspect of the plaintiff's application which is alleged to be difficult or complicated. Learned counsel for both the defendants did not even particularise any single triable issue. In other words, the written and oral submissions did not condescend on any particulars whatsoever. I have no difficulty in holding, which I hereby do, that the plaintiff's case is a plain and obvious case in which both the defendants have committed a fundamental breach in defaulting to pay the balance of the

purchase price, but nevertheless having vacant possession of the property and in the face of the aforesaid fundamental breach, with the assistance of their solicitors, registered the transfer of the property in their names, which conduct of both the defendants and/or their solicitors certainly defy logic and comprehension.

In the circumstances, I hold that the plaintiff is entitled to summary judgment under O. 14 and therefore give an order in terms of the plaintiff's application in encl. (11).